STATE OF MICHIGAN

IN THE MICHIGAN SUPREME COURT

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

EDWARD PINKNEY,

Defendant-Appellant.
_____/

Docket No. 154374

Court of Appeals No. 325856

Lower Court No. 2014001528 FH

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**PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF**
**ORAL ARGUMENT REQUESTED**

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## STATEMENT OF JURISDICTION

Plaintiff accepts the statement of jurisdiction in defendant's application for leave.

## STATEMENT OF QUESTIONS PRESENTED

I. Has defendant failed to show that the trial court abused its discretion or violated defendant's constitutional rights in admitting evidence of his political and community activities, and has also failed to show that he was unfairly prejudiced by its admission?

Plaintiff-Appellee answers: "YES"
Defendant-Appellant answers: "NO"
The trial court answered: "YES"

II. Was defendant properly convicted under MCL 168.937 because it is a substantive, constitutionally sound statute prohibiting forgery under the Michigan Election Law?

Plaintiff-Appellee answers: "YES"
Defendant-Appellant answers: "NO"
The trial court answered: "YES"

## STATEMENT OF FACTS

A jury found defendant guilty of five counts of forgery under the election code, MCL 168.937, before Berrien County Trial Court Judge Sterling R. Schrock (Tr VIII,[1] 1806-1807). The jury acquitted defendant of six counts of making a false statement in the certificate of a recall petition,[2] MCL 168.957. *Id.* at 1807. Judge Schrock sentenced defendant to 30 to 120 months' imprisonment (S Tr, 74).

In 2013, James Hightower was the Mayor of Benton Harbor (Tr III at 682). Defendant, a long-time community activist, was the leader of the local chapter of the Black Autonomy Network Community Organization (BANCO). *Id.* at 572-573. Defendant spoke publicly against Hightower at BANCO meetings, at City Hall, and on the street. *Id.* at 529, 531, 581, 585. He opposed Hightower because Hightower voted against allowing a city income tax proposal to be placed on the ballot – a tax proposal which defendant believed would bring in more money from Whirlpool Corporation,[3] which defendant made an object of attack. *Id.* at 609, 684, 700-701. Defendant had "been a leader in … positions that would suggest that Whirlpool is disingenuous in their growth in the city" of Benton Harbor (Tr VI at 1617).

Defendant spearheaded a recall effort against Hightower in the fall of 2013 (Tr III at 609, 665). Defendant was not eligible to sponsor the recall petition because he did not live within the Benton Harbor city limits. *Id.* at 659; Tr IV at 733, 739. Instead, James Cornelius, who lived inside the city, was the official sponsor (Tr III at 657-660). But defendant was with Cornelius

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[1] "Tr" refers to the trial transcript and is followed by the appropriate volume number in Roman numerals. "S Tr" refers to the December 15, 2014 sentencing transcript, which also includes several defense motions. "SC Tr" refers to the transcript of the status conference on October 20, 2014.

[2] These counts had to do with defendant's submission of petitions with duplicate signatures. Evidence relating solely to these counts is not included in this statement of facts.

[3] Whirlpool Corporation's world headquarters is located in Benton Harbor.

when he filed the petition with the clerk and assisted Cornelius in filling out the required form (Tr IV at 749-750, 759).

A November 6, 2013 letter to Cornelius from the Clerk's Office stated that the recall language had been approved (Tr IV at 760). This triggered the 180-day time period – until May 5, 2014 – during which signatures could be collected.[4] *Id.* at 734, 761. By statute, however, the only signatures that would be valid would be those made within a 60-day period before the completed recall petitions were submitted to the Clerk.[5] *Id.* at 736-737. The informational packets given to petition sponsors by the Clerk's Office included information about these statutory deadlines. *Id.* at 739. During the time of the Hightower recall effort, defendant sponsored ten petitions to recall members of the Benton Harbor Area Schools Board. *Id.* at 769-771. He therefore received these informational packets. *Id.* at 878-881.

Defendant was the circulator for 33 of the 62 sheets of signatures to recall Hightower; no one else circulated more than eight (Tr VI at 1630). Some of the others who circulated petitions, including Cornelius, got them from defendant and returned them to defendant when they were completed (Tr IV at 525-526, 533, 552-553, 597-599, 634-635, 638, 653-654).

The City Clerk's Office was unexpectedly closed on Monday and Tuesday, January 6 and 7, 2014, because of a snowstorm and extreme cold (Tr IV at 828).

At about 8:30 on the morning of January 8, 2014, defendant showed up at the Berrien County Clerk's Office to file a stack of completed recall petitions. He was alone (Tr IV at 766-768, 844-845). Carolyn Toliver, the Elections Administrator, did not accept the petitions because only the sponsor, Cornelius, was allowed to file them. *Id.* at 728, 767. Defendant said,

[4] MCL 168.952(8).
[5] MCL 168.961(2)(d).

"I'll be right back." He returned about an hour later with Cornelius and the petitions were accepted. *Id.* at 768-769, 844-845.

The clerk's office originally determined that the petitions contained enough valid signatures to trigger a recall election, despite an unusually large number of people who had signed twice (Tr IV at 785-786, 859). Later, however, problems came to light with the dates accompanying many of the signatures. *Id.* at 793. A forensic document examiner with the Michigan State Police determined that on five of the recall petitions, a total of 27 signature dates had been altered with different ink. *People v Pinkney*, 316 Mich App 450, 456-457; 891 NW2d 891 (2016). All five of these petitions were circulated by defendant. *Id.* at 456.

Because of the statutory time limit, only signatures dated on or after November 9, 2013 – 60 days before the signed petitions were turned in on January 8, 2014 – were valid (Tr IV at 790-791). In every case where a signer's date had been altered, it had been changed from November 7 or 8, 2013, to a date on or after November 9, 2013. *Pinkney*, 316 Mich App at 456-457. In short, it appeared that the dates had been changed to try to validate untimely signatures. *Id.* at 458. Several people testified who had signed the recall petitions and whose signing dates had been changed, but they largely did not remember whether they or someone else was responsible for the changes. *Id.*

Besides being mayor, Hightower was Director of Trauma and Clinical Services at Lakeland Healthcare (Tr III at 681-682). About a week after the signed recall petitions were submitted, defendant emailed Hightower's boss at Lakeland. *Id.* at 695-696. The email accused Hightower of using Facebook to "give Benton Harbor residents the illusion that Lakeland supports negativity." Defendant claimed Hightower was using a Lakeland email account to denigrate City Commissioner Trenton Bowen. Defendant wrote, "Hightower wants Bowen, the

smartest commissioner we've had in a long time, off the commission. This … James Hightower, is he the type of person Lakeland Hospital wants leading the emergency ward?" *Id.* at 697-698. When Hightower learned of this email, he telephoned defendant to ask why he was doing this. Defendant "said he was going to keep pounding [Hightower's] ass." *Id.* at 699.

After the assessment of problematic signatures and dates on the recall petitions, the Clerk's Office concluded that there were not enough valid signatures to trigger a recall (Tr IV at 785, 794). Consequently, the recall election was not held (Tr III at 715). Later, defendant filed twelve recall petitions against Sharon Tyler, the Berrien County Clerk, all relating to the unsuccessful recall petition drive against Hightower (Tr VI at 1406-1409).

Defendant produced three witnesses – Marquette Coates, Tamara Jude, and Quacy Roberts – who claimed that on January 7, 2014, they were at Coates' house and witnessed a woman named Venita Campbell changing dates on the recall petitions before Roberts took them from her (Tr VI at 1505-1507, 1532-1533, 1554-1555). None of these witnesses could state with accuracy what changes Campbell was making, only that she was making marks on the petitions. *Id.* at 1511-1513, 1538, 1564. None of them reported this because, they said, they did not trust the police. *Id.* at 1515-1518, 1546, 1575. (On rebuttal, a Benton Township police sergeant testified that Roberts had talked with him 15 to 20 times during the previous year, often at Roberts' solicitation, and that Roberts had filed complaints with the police department (Tr VII at 1670-1672).

Defendant testified and denied altering any of the petitions, saying that if he had seen any dates outside the 60-day cutoff, he would have gone out and gotten those people to sign again (Tr VI at 1593-1594). According to defendant, Campbell was involved with the recall movement and actually composed the language for the recall petition. Defendant said he

entrusted Campbell with the petitions and assigned her the tasks of catching double signatures and ensuring that signers were registered voters. *Id.* at 1597-1600, 1602-1603. Campbell came to defendant's house on January 3, defendant signed the petitions he had circulated, and Campbell then took the petitions away with her. *Id.* at 1601.

But Campbell neither circulated nor even signed any of the petitions. *Id.* at 1609, 1618. Nor did she speak out against Hightower or for the city income tax proposal. *Id.* at 1618. By defendant's admission, none of the witnesses mentioned Campbell as a leader in the recall effort. *Id.* at 1628. Detective-Sergeant David Zizkovsky, the officer in charge of the case, testified that Campbell's name never came up during the investigation. *Id.* at 1676-1677. Furthermore, defendant did not know where Campbell lived; had he needed to, he said, he "could have found her around." *Id.* at 1609-1610.

Defendant described Venita Campbell as in her late twenties (Tr VI at 1608). Toliver searched the statewide voter registration system and found only two Venita Campbells: one in Wayne County who was born in 1970, and another in Genesee County who was born in 1938 (Tr VII at 1667-1668). Zizkovsky searched Secretary of State records, Facebook, White Pages, and two commercial online search databases. He used three different spellings of "Venita." He found a 77-year-old in Philadelphia and a 47-year-old in Virginia, but no one in her late twenties or close to it, either inside or outside Michigan. *Id.* at 1677-1679, 1682-1684.

On the morning of January 8, defendant said, he met Roberts by arrangement at a street corner and picked up a stack of completed recall petitions from him. (Tr VI at 1594). He did not wonder why Roberts had the petitions. *Id.* at 1627. Coincidentally, defendant had other petition sheets for Hightower's recall in his car at the time. *Id.* at 1636-1637. Defendant did not have time to examine the petitions; he was in a hurry to get to the courthouse by 9:00 because he was

usually there by then, watching courtroom proceedings and giving advice to people. *Id.* at 1594-1595, 1602, 1626. And he "just wanted to" file the petitions that morning "since I had them." *Id.* at 1628. When Toliver would not accept the petitions, he went and got Cornelius and returned with him. *Id.* at 1595.

According to defendant, Toliver and Tyler were conspiring, along with the sheriff's department, to stop the recall election against Hightower (Tr VI at 1631-1632).

Defendant appealed, claiming that (1) MCL 168.937 does not set forth a substantive offense; (2) there was insufficient evidence to support his convictions; (3) the trial court erroneously instructed the jury that it could convict him as an aider and abettor, and his trial counsel was ineffective for failing to object to that instruction; and (4) the trial court erred in admitting other-acts evidence against him. The Court of Appeals rejected all these claims. *Pinkney*, 316 Mich App at 462-479.

Defendant applied for leave to appeal to this Court. This Court has ordered supplemental briefing addressing:

> (1) whether the trial court abused its discretion when it admitted evidence under MRE 404(b) that related to the defendant's political and community activities other than the mayoral recall effort for the purpose of showing the defendant's motive to commit the instant crimes, and (2) whether the Court of Appeals erred in determining that MCL 168.937 creates the substantive offense of election forgery and is not merely a penalty provision for the specific forgery offenses set forth in other provisions of the Michigan election law. [Order, MSC No. 154374, 5/17/17.]

Additional facts will be set forth as needed in the argument.

## ARGUMENT

### I. Defendant has failed to show that the trial court abused its discretion in admitting evidence of his political and community activities, and has also failed to show that he was unfairly prejudiced by its admission.

**Standards of Review.** The decision whether to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). A trial court abuses its discretion when it chooses an outcome outside the range of principled outcomes. *People v Musser*, 494 Mich 337, 348; 835 NW2d 319 (2013). Even if the evidence was admitted erroneously, defendant must show it is more probable than not that a miscarriage of justice occurred. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Because defendant did not object to the lack of notice under MRE 404(b)(2) regarding the "other acts" evidence elicited from defendant on cross-examination, review is for plain error affecting defendant's substantial rights. *Carines*, 450 Mich at 774. This Court should reverse "only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.*

Constitutional questions are reviewed de novo. *People v Likine*, 492 Mich 367, 387; 823 NW2d 50 (2012).

The People introduced evidence of defendant's political and community involvement because that was the context in which he expressed his deep desire to remove Mayor Hightower from office, and in which he demonstrated the lengths he would go to in pursuit of that goal. The evidence showed that defendant had a specific and unusually strong motive to alter the dates on the recall petitions, not that he had a general propensity for bad acts. Contrary to defendant's arguments, this evidence did not violate his right to a fair trial under MRE 404(b), the First Amendment, or due process principles.

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

In *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), this Court adopted a test for determining the admissibility of evidence under MRE 404(b)(1). Such evidence may be admitted where

> (1) the evidence is offered for some purpose other than under a character-to-conduct theory, or a propensity theory, (2) the evidence is relevant to a fact of consequence at the trial, and (3) the trial court determines under MRE 403 that the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. If requested, the trial court may provide a limiting instruction under MRE 105. [*People v Ackerman*, 257 Mich App 434, 439-440; 669 NW2d 818 (2003), citing *People v Sabin*, 463 Mich 43, 55-56; 614 NW2d 888 (2000).]

The prosecutor filed a notice of intent, which he amended several times, to introduce other acts evidence under MRE 404(b). The trial court dealt with the amended motion at the status conference a few days before trial (SC Tr at 8). The prosecutor's reasons for offering this evidence were to show defendant's unusually strong motive for changing the signature dates on the recall petitions and the absence of any mistake on defendant's part. *Id.* at 10.

The trial court found it appropriate to allow the People to introduce some evidence of motive, but also stated that this evidence should be limited. *Id.* at 11. To that end, the court agreed that the People could present the following evidence:

- Testimony from James Hightower about defendant's participation in "public comments relative to anti-Hightower and Hightower and/or Hightower-Whirlpool alliance." [*Id.* at 12.]

- Testimony from Hightower about defendant's advocacy for the city income tax measure that Hightower opposed, which was the stated reason for recalling Hightower. [*Id.* at 12-13.]

- Testimony from Carolyn Toliver about defendant's involvement with the recall effort. [*Id.* at 13-14.]

- Evidence from Toliver that defendant had sponsored other recall petitions contemporaneously with the attempt to recall Hightower, to show that defendant would have received knowledge of the rules governing the collection and submission of petitions. [*Id.* at 15-17.]

- Evidence from Berrien County Clerk Sharon Tyler about defendant's attempts to have her recalled because of her handling of the recall effort against Hightower. The court limited the People to evidence that defendant had submitted several recall petitions against Tyler and did not permit the prosecutor to elicit the language defendant used. [*Id.* at 17-22.]

- Evidence from other circulators of the Hightower recall petitions about defendant's involvement in the recall effort and his anti-Hightower and anti-Whirlpool sentiments. [*Id.* at 24-25.]

The trial court did not allow the prosecutor to present evidence from Tyler that defendant had advocated at County Commission meetings for the recall of Hightower or Tyler (SC Tr at 22-24).

In short, the trial court gave this matter careful consideration and admitted evidence that showed defendant's motives and his knowledge of the recall process.

Nonetheless, defendant lists four kinds of evidence he claims were improperly admitted. First, defendant points to Sharon Tyler's testimony that defendant tried 12 times to have her recalled from her position as County Clerk. All 12 recall attempts were based on the failed recall effort against Hightower. Second, defendant complains of Hightower's testimony about defendant's "involvement with BANCO, anti-Whirlpool activity and political and community affairs not directly related to the effort to recall Hightower." Defendant's third category of allegedly improper evidence is similar: testimony from other prosecution witnesses that defendant "spoke on numerous occasions against Whirlpool and the tax issue and was involved in BANCO and many community and political matters." Lastly, defendant notes that during his cross-examination, the prosecutor asked questions about political and community activities that did not directly involve Hightower, Whirlpool, or the city income tax proposal.

This evidence satisfied the three requirements for admissibility under *VanderVliet*, which the People address in turn.

**A. The evidence was admitted to show a specific motive, not a general propensity for bad acts.**

As MRE 404(b) states, other-acts evidence can be admitted as proof of motive, but not as proof of a person's character to show action in conformity with that character (propensity). The latter is narrowly defined.

> "[O]nly one series of evidential hypotheses is forbidden in criminal cases by Rule 404: a man who commits a crime probably has a defect of character; a man with such a defect of character is more likely … to have committed the act in question." [*People v Engelman*, 434 Mich 204, 212-213; 453 NW2d 656 (1990), quoting 2 Weinstein, Evidence, ¶ 404[8], 404-52.]

Proving motive does not involve this forbidden series of inferences. It relies not on painting an individual as a generally bad person likely to do bad things, but on showing that the individual has a particular reason for doing a particular thing. One court described the distinction in this way:

> It is obvious that evidence is not barred by [Neb Evid R 404(2), Neb Rev Stat § 27–404(2)][6] just because its relevance could be characterized in terms of "propensity"…. Motive evidence … can easily be framed as relevant because it shows a defendant's "propensity" to commit crimes for a particular reason, i.e., motive. Someone who has a motive to commit a crime could also be described as having a "propensity" to commit the crime. But where the defendant's motive is particular—in other words, is not based in the defendant's character—evidence of prior acts is nonetheless admissible to show the defendant's motive to commit the charged crime because an inference of a *criminal* propensity is not required to establish independent relevance. [*State v Torres*, 283 Neb 142; 812 NW2d 213, 233 (2012).

Our Court of Appeals has repeatedly applied this distinction. In *People v Hoffman*, 225 Mich App 103, 104-110; 570 NW2d 146 (1997), the Court upheld the admission of evidence that the defendant hated women to prove his motive for kidnapping and assaulting a woman with the intent to murder her. The other acts introduced against the defendant included his assaulting and battering two other women and his statement that "women are all sluts and bitches and deserve to

[6] This is Nebraska's rough equivalent of MRE 404(b).

die." *Id.* at 107. The Court took pains to differentiate the evidence of the defendant's particular motive from evidence based on a person's propensity for violence in general. *Id.* at 107-108.

The Court drew a similar distinction in *People v Watson*, 245 Mich App 572; 629 NW2d 411 (2001). The defendant in that case was found guilty of several crimes involving criminal sexual conduct against his stepdaughter. *Id.* at 574-575. He challenged the admission of a photograph, found in his wallet, of the victim's naked buttocks, arguing that it showed only that he was a sexual pervert. *Id.* at 575, 577. Citing *Hoffman*, this Court held the admission of the photograph proper because it showed "more than defendant's propensity toward sexual deviancy; it showed that he had a specific sexual interest in his step-daughter, which provided the motive for the alleged sexual assaults." *Id.* at 578-580.

As the Court of Appeals held, *Pinkney*, 316 Mich App at 475, the People demonstrated defendant's specific motive in this case, not his general character. Evidence that defendant actively opposed Mayor Hightower – before, during, and after the recall attempt – was introduced to show his unusually strong motive to falsify the recall petitions. Evidence that defendant made 12 attempts to have Sharon Tyler recalled from her position as County Clerk, all of which were based on the failed recall effort against Hightower, was introduced for the same reason.[7] Similarly, evidence of defendant's "anti-Whirlpool" sentiments and activism was introduced because it was inextricably bound up with his desire to recall Hightower. The reason defendant was hell-bent on recalling Hightower was Hightower's opposition to an income tax that defendant believed would have impacted Whirlpool, a company he opposed (Tr III at 609,

[7] Defendant asserts that this evidence should not have been admitted because the attempts to recall Tyler occurred *after* the crimes involving the Hightower recall effort. This is not a basis for excluding evidence under MRE 404(b). The rule specifically states that evidence of other acts can be admitted "whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case." MRE 404(b)(1).

684, 700-701). And an explanation of BANCO and defendant's involvement with it was necessary in order to provide context for evidence that defendant used the public forum provided by BANCO to speak against Hightower and Whirlpool. *Id.* at 529, 531, 575-576, 581.

The remaining other-acts evidence – defendant's political and community activities that did not directly involve Hightower, Whirlpool, or the city income tax proposal – did not implicate defendant's specific animosity toward Hightower. But as the Court of Appeals observed, neither did it create a "character-to-conduct" inference. *Pinkney*, 316 Mich App at 476. No character trait of defendant – and certainly not a negative one – was suggested by the mere fact that he participated in political and community activities.

Instead, this evidence pointed to another motive. The prosecutor elaborated on this in closing argument. Noting defendant's multifaceted community involvement – and after expressly denying any suggestion that there was anything wrong with it – the prosecutor argued:

> I think you could take all of this together and see what he wants to be. What he wants to be. And to succeed in recalling the mayor of Benton Harbor would be another – what? – feather in his cap. [*Id.* at 1689-1690.]

In other words, defendant had another reason to want the recall election to succeed beyond that presumably shared by others who signed or circulated the petitions. For defendant, getting Hightower recalled would have been a personal achievement and résumé builder.[8]

[8] Defendant also challenges the evidence brought out during the cross-examination of defendant because the prosecutor did not give advance notice under MRE 404(b)(2). But because the evidence was substantively admissible and defendant "has not demonstrated how he would have approached trial or presented his defense differently had he known in advance" that this evidence would be introduced, he has not suffered outcome-determinative prejudice. *People v Jackson*, 498 Mich 246, 278-279; 869 NW2d 253 (2015).

**B. Evidence of motive was relevant to a fact of consequence at trial: defendant's identity as the perpetrator.**

Evidence of the defendant's motive to commit the charged crime lends itself to three theories of logical relevance, one of which is identity. *Sabin*, 463 Mich at 68, citing Imwinkelried, Uncharged Misconduct Evidence, §§ 3:15, 4:19, and 5:35. Indeed,

> if a strong motive be shown, unquestionably it would require a lesser amount of other evidence to bring about a conviction. In other words, motive to commit crime, if shown, may in many cases be sufficient alone, almost, to induce a belief of guilt.... Men do not ordinarily commit grave crimes unless there is in their minds a motive strong enough to overcome the natural repugnance against crime, and the fear of punishment which usually follows detection. [*Son v Territory*, 5 Okla 526; 49 P 923, 925 (1897).]

Using evidence of motive to help show identity was especially appropriate here. "In cases in which the proofs are circumstantial, evidence of motive is particularly relevant." *People v Unger*, 278 Mich App 210, 223; 749 NW2d 272 (2008). *Accord*, 1 Wharton's Criminal Evidence § 4:45 (15th ed 1997) ("An inquiry as to motive is often of great importance, particularly in a case based largely on circumstantial evidence").

> Since motive leads to action, courts hold motive is strong probative evidence with respect to identity.... [I]f a motive is unique to only one person or unique to a set of persons smaller than the general population, it is probative of identity. Even when a motive is shared by a number of others, courts tend to admit proof of motive. [*Johnson v State*, 872 P2d 93, 97 (Wyo, 1994).]

In this case, the other acts evidence showed that defendant had peculiarly strong motives to have Mayor Hightower recalled – much stronger than anyone else who might have thought the recall petition was a good idea. He was, therefore, the most likely person to have altered the recall petitions. It is one thing to be willing to sign a petition; it is another to be willing to falsify documents and corrupt the electoral process. It takes a much stronger motive to do the latter than the former. Others may have disliked Hightower; defendant pursued him as Captain Ahab pursued Moby-Dick. Defendant admitted his intention to "keep pounding [Hightower's] ass."

Defendant's passionate opposition to Hightower and what Hightower stood for was more likely to overcome "the natural repugnance against crime and the fear of punishment" than anyone else's mere dislike of Hightower's policies. *Son*, 49 P at 925.

### C. The trial court did not abuse its discretion in determining that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

This part of the *VanderVliet* test is really the nub of the dispute. The Court of Appeals concluded that the other-acts evidence in this case was highly probative because it showed defendant's motive to alter the dates on the recall petitions, thus providing evidence of his identity as the perpetrator. *Pinkney*, 316 Mich App at 476. The Court rejected defendant's argument that the probative value of this evidence was marginal "compared to the fact 'that his political views are not popular with some people in the community,'" stating that "the record simply reflects otherwise." *Id.*

The Court of Appeals was correct. Evidence that defendant's aggressive opposition to Mayor Hightower and to Whirlpool gave him a powerful motive to commit the charged crimes was no doubt prejudicial to his case. But it was not *unfairly* prejudicial. And the evidence of defendant's political and community activities that were not directly related to Hightower and Whirlpool carried no significant danger of unfair prejudice at all.

Defendant combines his First Amendment argument with his assertion of unfair prejudice under MRE 403. But "there appears to be little support" for holding "that concerns about jury prejudice and confusion should carry more weight in the context of core First Amendment activity." *United States v Ring*, 706 F3d 460, 473 (CA DC, 2013). Defendant acknowledges that "the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations … simply because those beliefs and associations are protected by the

First Amendment." *Dawson v Delaware*, 503 US 159, 165; 112 S Ct 1093; 117 L Ed 2d 309 (1992). In fact, "the Supreme Court has held on many occasions … that opinions and other information that otherwise might be entitled to First Amendment protection are not immune from discovery and use as evidence in court, as long as they are relevant to an issue in a given case." *United States v Curtin*, 489 F3d 935, 953-954 (CA 9, 2007).

More specifically, "[t]he First Amendment … does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent." *Wisconsin v Mitchell*, 508 US 476, 489; 113 S Ct 2194; 124 L Ed 2d 436 (1993). Such evidence "is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like." *Id.* In other words, it is evaluated in the same way as other-acts evidence in general. And in a weighing of probative value versus danger of unfair prejudice, the fact that a defendant's speech may be highly unpopular or offensive does not warrant its exclusion if it is also significantly probative of motive.

One case that illustrates this clearly is *United States v Rahman*, 189 F3d 88 (CA 2, 1999). Abdel Rahman was convicted of seditious conspiracy, soliciting the murder of Egyptian President Hosni Mubarak, conspiracy to murder Mubarak, soliciting an attack on American military installations, and a bombing conspiracy. *Id.* at 103. On appeal, Rahman challenged the government's use in evidence of his "speeches, writings, and preachings that did not in themselves constitute the crimes of solicitation or conspiracy." *Id.* at 117-118. The Second Circuit rejected this challenge:

> [Rahman] is correct that the Government placed in evidence many instances of Abdel Rahman's writings and speeches in which Abdel Rahman expressed his opinions within the protection of the First Amendment. However, while the First Amendment fully protects Abdel Rahman's right to express hostility against the United States, and he may not be prosecuted for so speaking, it does not prevent the use of such speeches or writings in evidence when relevant

> to prove a pertinent fact in a criminal prosecution. The Government was free to demonstrate Abdel Rahman's resentment and hostility toward the United States in order to show his motive for soliciting and procuring illegal attacks against the United States and against President Mubarak of Egypt. [*Id.* at 118 (citations omitted).]

Similarly, in *United States v Mostafa*, 16 F Supp 3d 236, 248 (SDNY, 2014), the defendant was charged with several crimes involving hostage-taking, supporting terrorist organizations, and facilitating violent jihad. The government sought to admit a large amount of other-acts evidence in the form of various statements the defendant had made. Much of this was directly related to the charged crimes – that is, it reflected the defendant's support of jihad or terrorism.[9] *Id.* at 257-268.

But also included was a statement in which the defendant merely "refer[red] to [Osama] bin Laden as a reformer, a victim of American policies, and a good-hearted person." *Mostafa*, 16 F Supp 3d at 256. Although this statement contained no reference to the kinds of acts with which the defendant was charged, it was nonetheless admissible because defendant was charged with supporting al Qaeda, which was led by bin Laden. The fact that the defendant viewed bin Laden as a hero bore on his motive, knowledge, and intent with respect to that charged conduct. *Id.* The Court rejected the defendant's argument that any mention of bin Laden was unfairly prejudicial, noting that since the defendant was charged with crimes involving support for bin Laden and al Qaeda, the statement was "no more disturbing than the crimes charged." *Id.*

In *United States v Hoffman*, 806 F2d 703, 708 (CA 7, 1986), the Seventh Circuit upheld the admission of evidence of the defendant's religious affiliations in a prosecution for threatening the life of the President of the United States. The defendant sent a threatening letter

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[9] The People do not suggest that the other-acts evidence in the instant case was relevant in the same way. That is, the other-acts evidence did not contain statements from defendant that he supported the idea of falsifying election documents.

to President Reagan. *Id.* at 704. The government introduced evidence that the defendant was affiliated with the Reverend Sun Yung Moon, whom Reagan had apparently declined to pardon, and who therefore remained confined. *Id.* at 704-705, 708-710. The defendant had expressed his opinion that Moon was wrongfully imprisoned. *Id.* at 709. The Court held that this evidence showed a possible motive for the defendant to send the letter, and that its probative value was not substantially outweighed by its prejudicial effect. *Id.* at 708-710.

Another defendant charged with threatening the life of the President also failed to convince a reviewing court that evidence of his speech was unfairly admitted. The defendant was convicted of making threatening statements against President Franklin Delano Roosevelt. *Reid v United States*, 136 F2d 476 (CA 5, 1943). Evidence that the defendant had indicated he preferred the United States to be ruled by Hitler was relevant and admissible to show that his statements against the President were knowingly and willfully made. *Id.* See also *Haupt v United States*, 330 US 631, 642; 67 S Ct 874; 91 L Ed 1145 (1947) (defendant's statements showing sympathy with Hitler and hostility to the United States were admissible to show intent in prosecution for treason).

And evidence of a defendant's interest in Satanism and preference for death metal music did not violate his First Amendment rights where it was relevant to show the motive for a murder and an attempted murder. *State v Brumwell*, 350 Or 93; 249 P3d 965, 975 (2011).

Surely evidence of Satanism, hostility toward the United States, or sympathy with Adolf Hitler carries a much greater danger of unfair prejudice than evidence of defendant's disapproval of Mayor Hightower and of Whirlpool. Not only were defendant's attitudes far less controversial, but they were more specific to the charged crimes. The People did not introduce

evidence that defendant was hostile toward Benton Harbor, or toward government in general, but that he was hostile toward Hightower, the subject of the recall election.

Regarding evidence of defendant's general community involvement, the Court of Appeals understandably could not discern how it created any significant risk of unfair prejudice. The People did not introduce evidence of other crimes, torts, or morally reprehensible acts. Nothing in the record indicates that mere evidence of defendant's political and community activity would have conveyed a negative impression to the jury. The People did not introduce evidence that this activity was directed toward shutting down orphanages or instigating riots. BANCO's mission, for example, is to "fight for freedom, justice, and equality for all" (Tr VI at 1611). It provides food, clothes, and shelter for the needy. *Id.* Involvement with such an organization could hardly carry a stigma.

In fact, defendant accepted the fact that many jurors knew of his community involvement. Before the usual jury selection process began, the trial court supplied the prospective jurors with a four-question form approved by the parties (Tr I at 3). After the prospective jurors completed the form, the court brought in and individually questioned those who had indicated that they knew something about the case or about defendant. *Id.* at 3-4. Defense counsel remarked that almost half of the panel fit this description. *Id.* at 13. Some of them said they had seen, read, or heard about defendant's activities in the community other than those involved in the case. *Id.* at 38, 62-63, 69, 78-79, 82-83, 95, 105, 109, 154, 169, 179, 225. But defendant declined to challenge most of those prospective jurors if they indicated that they could be fair and open-minded. *Id.* at 38-48, 69-77, 95-103, 109-119, 154-159, 169-174, 179-185.

And the prosecutor and the trial court took steps to ensure that the jury did not improperly consider defendant's political activities as mere propensity evidence. The prosecutor stated at the beginning of his closing argument:

> First thing I want to discuss is Edward Pinkney's stature in the community. And the reason I want to discuss that is not to suggest that any of his activities in relation to the community is wrong. There's nothing wrong with that. There's free speech elements to it, free association elements to it. [Tr VII at 1688.]

The trial court also instructed the jury that it could not consider the other acts evidence for improper purposes (Tr III at 581; Tr VII at 1753). The jury is presumed to have followed those instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

### D. Even if some of the other-acts evidence was erroneously admitted, defendant has not shown it is more likely than not that a miscarriage of justice occurred in light of the strong evidence against him.

Even if this Court determines that more other-acts evidence was admitted than necessary to show defendant's motive and knowledge of the recall process, defendant must show it is more probable than not that a miscarriage of justice occurred.[10] *Carines*, 460 Mich at 774. He cannot do this because the evidence against him – including the properly admitted evidence of motive – was very strong.

In addition to evidence of a motive stronger than anyone else's, the People showed that defendant possessed unique knowledge about how the petition dates would have to be changed in order to be valid. Defendant circulated all five recall petition pages that were falsified. He

[10] Defendant argues that the admission of this evidence violated his general due process rights. But "[a]lthough any error can potentially be argued to have deprived a defendant of his due-process fair-trial right, not every trial error is constitutional in nature." *People v Blackmon*, 280 Mich App 253, 261; 761 NW2d 172 (2008), citing *People v Toma*, 462 Mich 281, 296; 613 NW2d 694 (2000). Evidentiary errors, in general, are non-constitutional. See *People v Lukity*, 460 Mich 484, 491-497; 596 NW2d 607 (1999). So even if the other-acts evidence was admitted erroneously, defendant must meet the standard of review for preserved, non-constitutional error.

possessed and signed all of them on Friday, January 3, 2014, which suggested he intended to submit them all to the Clerk on the following business day: Monday, January 6. He had received information packets in connection with other recall campaigns that alerted him to the 60-day cutoff. So he had reason to appreciate the significance of the unexpected closure of the Clerk's Office on January 6 and 7. He knew which signature dates – November 7 and 8, 2013 – had been rendered invalid as a result of that closure, and that November 9 was the earliest date they could be changed to in order to be considered valid if submitted on January 8.

Defendant also knew that if he submitted the petitions even one day later, many more signatures – those dated November 9 – would be invalidated. There were dozens of unaltered signatures that bore the date of November 9 (see Appendix A, excerpt of recall petitions introduced as People's Exhibit 7A at trial). This explains why, when the Clerk told defendant on the morning of January 8 that only James Cornelius could submit the completed petitions, defendant immediately returned with Cornelius and ensured that the petitions were filed on January 8.

And only defendant or someone acting at his behest could have known with certainty that defendant would be submitting the petitions on January 8, 2014, and therefore that November 9, 2013 would be the earliest date for acceptable signatures. The fact that the earliest falsified dates were "11/9/13" and "11/09/13" points to defendant.

Defendant was the only person involved for whom a powerful motive, the necessary knowledge, and possession of the petitions were all established. Adding to this evidence were his own guilty actions – attempting to show that Venita Campbell, who never circulated or even signed a recall petition, whose name never arose during the investigation, and the location of whose residence defendant did not know, was the driving force behind the recall election and the

one who independently forged the signature dates. Defendant has not shown a miscarriage of justice in light of the powerful evidence of his guilt.

## II. Defendant was properly convicted under MCL 168.937 because it is a substantive, constitutionally sound statute prohibiting forgery under the Michigan Election Law.

**Standard of Review.** Questions of statutory construction are reviewed de novo. *People v Perkins*, 473 Mich 626, 630; 703 NW2d 448 (2005).

The Court of Appeals has held that the statute under which defendant was convicted, MCL 168.937, creates the substantive offense of forgery for purposes of the Michigan Election Law. The intent of the Legislature and principles of statutory construction support this conclusion. Because defendant forged documents covered and regulated by the Michigan Election Law, he was properly convicted under MCL 168.937.

### A. MCL 168.937 is a substantive statute, not merely a penalty provision.

MCL 168.937 states:

> Any person found guilty of forgery under the provisions of this act shall, unless herein otherwise provided, be punished by a fine not exceeding $1,000.00, or by imprisonment in the state prison for a term not exceeding 5 years, or by both such fine and imprisonment in the discretion of the court.

In *People v Hall*, unpublished opinion per curiam of the Court of Appeals (Docket No. 321045, decided October 23, 2014) (*Hall I*) (Appendix B), the Court employed the following analysis in concluding that MCL 168.937 proscribes a substantive crime:

> The Michigan election law, MCL 168.1 *et seq.*, was enacted for the stated purpose of, among other things, regulating primaries and elections; providing for the "purity" of the election process; and guarding against "the abuse of the elective franchise." 1954 PA 116....
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> * * *
>
> Reviewing this statute in the context of the Michigan election law as a whole, indicates that MCL 168.937 is not merely a penalty provision, but rather creates a substantive offense of forgery. Importantly, MCL 168.935, another

statute contained within the "Offenses and Penalties" chapter of the Michigan election law, specifically sets forth the penalties to be imposed for felony offenses under the Michigan election law:

> Any person found guilty of a felony under the provisions of this act shall, unless herein otherwise provided, be punished by a fine not exceeding $1,000.00, or by imprisonment in the state prison for a term not exceeding 5 years, or by both such fine and imprisonment in the discretion of the court.

The language of MCL 168.937 and MCL 168.935 is identical, except that MCL 168.935 uses the word "felony" and MCL 168.937 uses the word "forgery." Thus, because MCL 168.935 sets forth the penalties for a felony conviction under the provisions of the Michigan election law, reading MCL 168.937 also as merely a penalty provision would effectively render MCL 168.937 duplicative of MCL 168.935 and mere surplusage. "This Court must avoid a construction that would render any part of a statute surplusage or nugatory." *People v Redden*, 290 Mich App 65, 76–77; 799 NW2d 184 (2010). In other words, there would be no need for MCL 168.937 to be limited to setting forth the penalty provisions for forgery if MCL 168.935 sets forth the penalty provisions for all felonies under election law. In addition, reading MCL 168.937 as merely a penalty provision, and not a provision creating a substantive offense of forgery, would contravene the expressed intent of the Legislature, which was to ensure the fairness and purity of the election process in part by proscribing misconduct that would foster such unfairness and impurity. See [*People v*] *Gillis*, 474 Mich [105,] 114–115[; 712 NW2d 419 (2006)] ("our primary task in construing a statute, is to discern and give effect to the intent of the Legislature.") [*Hall*, slip op at 6-7.]

The defendant in *Hall*, who worked on the campaign of a candidate for district court judge, entered false names and signatures on nominating petitions for that candidate. *Hall I*, slip op at 1. The district court refused to bind the defendant over on charges under MCL 168.937, and instead bound him over on misdemeanor charges under MCL 168.544c. *Id.* The prosecutor appealed the circuit court's order affirming this decision. *Id.* Although the Court of Appeals held that MCL 168.937 creates a substantive offense, the Court went on to affirm the lower courts because it held that MCL 168.544c was controlling. That statute provides that "[a]n individual shall not ... (a) [s]ign a petition with a name other than his own [or] (b) [m]ake a false statement in a certificate on a petition." MCL 168.544c(11)(a)-(b). Because MCL 168.544c was

the more recently enacted statute and was more specific with respect to the defendant's conduct, it controlled. *Id.*, slip op at 8.

This Court reversed in a unanimous opinion. *People v Hall*, 499 Mich 446, 464; 884 NW2d 561 (2016) (*Hall II*). This Court declined to reach the question whether MCL 168.937 creates a substantive offense. *Id.* at 449 n 2. But the Court held that MCL 168.937 and MCL 168.544c proscribe different conduct. *Id.* at 455. MCL 168.937 prohibits forgery, which, unlike the crime defined in MCL 168.544c, requires a specific intent to defraud. *Id.* at 455-458.

The Court of Appeals' reasoning in *Hall I*, which this Court left undisturbed in *Hall II*, is sound. In light of MCL 168.935, MCL 168.937 would be absolutely unnecessary if its only purpose was to supply a penalty for violations of other statutes in the Election Law. "This Court, as with all other courts, must give effect to every word, phrase, and clause in a statute, to avoid rendering any part of the statute nugatory or surplusage." *SBC Health Midwest, Inc v City of Kentwood*, ___ Mich ___; 894 NW2d 535, 538 (2016) (citation omitted).

And as the Court of Appeals observed, the primary goal of statutory construction is "to ascertain and give effect to the intent of the Legislature." *People v Pasha*, 466 Mich 378, 382; 645 NW2d 275 (2002). This Court construes an act as a whole to harmonize its provisions and attain that goal. *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 159; 627 NW2d 247 (2001).

Two of the stated purposes of 1954 PA 116, which created the Michigan Election Law, are "to provide for the purity of elections" and "to guard against the abuse of the elective franchise." See prelude to 1954 PA 116 (Appendix C). See also *People v Board of Supervisors of Osceola County*, 240 Mich 115, 120; 215 NW 33 (1927) (purpose of election statutes in general is "to prevent fraud and to secure freedom and secrecy to the elector in casting his vote").

Thus, MCL 168.937 is aimed at any forgery of documents covered by the Election Law, since forgery of those documents directly contravenes the purity of elections.

Defendant advances several arguments to support his assertion that MCL 168.937 is merely a penalty provision, meant to apply to conduct described elsewhere in the Election Law. First, he notes that the three statutory sections immediately preceding MCL 168.937 use very similar language, and that these are penalty provisions. Those sections state:

> Any person who shall be found guilty of a misdemeanor under the provisions of this act shall, unless herein otherwise provided, be punished by a fine of not exceeding $500.00, or by imprisonment in the county jail for a term not exceeding 90 days, or both such fine and imprisonment in the discretion of the court. [MCL 168.934.]
>
> Any person found guilty of a felony under the provisions of this act shall, unless herein otherwise provided, be punished by a fine not exceeding $1,000.00, or by imprisonment in the state prison for a term not exceeding 5 years, or by both such fine and imprisonment in the discretion of the court. [MCL 168.935.]
>
> Any person found guilty of perjury under the provisions of this act shall, unless herein otherwise provided, be punished by a fine not exceeding $1,000.00, or by imprisonment in the state prison for a term not exceeding 5 years, or by both such fine and imprisonment in the discretion of the court. [MCL 168.936.]

Based on the principle that identical language should receive identical construction, defendant argues that MCL 168.937 should also be viewed as a penalty provision.

The problem with this argument is that the vital language is not identical. "Misdemeanor" and "felony" are not specific crimes like forgery, but categories of crime based on severity. Examples of specific crimes that fall into each of these categories are listed in other sections of the Election Law. MCL 168.934 and MCL 168.935 provide penalties for numerous misdemeanors and felonies for which the Election Law is otherwise silent about penalties.

For example, MCL 168.931(1) states that "[a] person who violates 1 or more of the following subdivisions is guilty of a misdemeanor." It then lists 14 subdivisions, some of which

contain subparts that describe alternate ways of committing a particular offense. And MCL 168.931(2) provides that a person who violates a provision of the Michigan Election Law for which a penalty is not otherwise specifically provided is guilty of a misdemeanor. MCL 168.744 defines other misdemeanors, but mentions no penalty. MCL 168.944, MCL 168.945, and MCL 168.947 create other misdemeanors; the first two of these sections refer to MCL 168.934 to supply the penalty. MCL 168.744a, MCL 168.931a, and MCL 169.221a, in contrast, define other misdemeanors, but specify penalties different from the one set forth in MCL 169.934.

Similarly, MCL 168.932 states that "[a] person who violates one of the following subdivisions is guilty of a felony." It lists nine subdivisions, some of which contain subparts describing alternate ways of committing an offense. MCL 168.932e establishes another felony, but says nothing about the penalty. MCL 168.932c defines another felony; that section provides the same penalty as MCL 168.935. MCL 168.932a and MCL 169.233(12), on the other hand, establish other felonies, but prescribe penalties different from the one set forth in MCL 168.935.

Perjury, the penalty for which is prescribed in MCL 168.936, *is* a specific crime, but it is defined in MCL 168.933:

> A person who makes a false affidavit or swears falsely while under oath under section 848 or for the purpose of securing registration, for the purpose of voting at an election, or for the purpose of qualifying as a candidate for elective office under section 5582 is guilty of perjury.

Because the substantive offense of perjury is defined elsewhere, the only purpose for MCL 168.936 is to provide the penalty.

But this Court has already held[11] that MCL 168.937 is fundamentally different because, while forgery is a specific crime, the Election Law does not otherwise define it:

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[11] Defendant may claim the Court's statements here are dicta, but they are not. "Dicta" are "[s]tatements and comments in an opinion concerning some rule of law or legal proposition not

> Because defendant concedes that [MCL 168.937] creates the substantive offense of forgery, and *forgery is not defined elsewhere in the Michigan Election Law*, we turn to the common law to define "forgery" under MCL 168.937 for the purposes of this appeal. When a statute uses a general common law term to describe an offense, the statutory crime is defined as at common law. "The common-law definition of forgery is a false making, or a making *malo animo* of any written instrument with intent to defraud." The text of MCL 168.937 evinces no intent to displace this common law definition of forgery. *In contrast, MCL 168.936 similarly punishes "any person found guilty of perjury under the provisions of this act," but MCL 168.933 explicitly defines the offense of "perjury."* Given the Court of Appeals' holding that MCL 168.937 is a substantive offense, MCL 168.937 therefore requires the prosecution to prove not only the false making of a writing described in the Michigan Election Law, but also the specific intent to defraud, before a defendant may be convicted of election law forgery. [*Hall II*, 499 Mich at 456 (footnotes omitted, emphasis supplied).]

The penalties of MCL 168.937, then, apply to anyone who commits common-law forgery of "a writing described in the Michigan Election Law." Defendant falsified recall petitions, which are written instruments described in the Election Law. MCL 168.951 – 168.961a. He did so with the intent to defraud the County Clerk into certifying legally invalid signatures. That is forgery under MCL 168.937.

Seeking a narrower definition, defendant cites two other provisions in the Election Law that he claims, contrary to this Court's pronouncement in *Hall II*, define forgery. The first is MCL 168.932(c):

> A person who violates 1 or more of the following subdivisions is guilty of a felony:
>
> * * *
>
> (c) An inspector of election, clerk, or other officer or person having custody of any record, election list of voters, affidavit, return, statement of votes,

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necessarily involved nor essential to determination of the case in hand." *Wold Architects and Engineers v Strat*, 474 Mich 223, 232 n 3; 713 NW2d 750 (2006) (quotations omitted). This Court's conclusion that forgery was defined by common law rather than elsewhere in the Election Code was necessary to its ultimate holding that a conviction for forgery under MCL 168.937 required a common-law element not required for a conviction under MCL 168.544c: the specific intent to defraud. *Hall II*, 499 Mich at 455-459.

> certificates, poll book, or of any paper, document, or vote of any description, which pursuant to this act is directed to be made, filed, or preserved, shall not willfully destroy, mutilate, deface, falsify, or fraudulently remove or secrete any or all of those items, in whole or in part, or fraudulently make any entry, erasure, or alteration on any or all of those items, or permit any other person to do so.

Defendant's interpretation of this subsection runs afoul of the laws of statutory construction. First, MCL 168.932(c) does not state that a person who violates it is guilty of forgery. Instead, it says the person is guilty of a *felony*. This points the reader not to MCL 168.937, which deals with forgery, but to MCL 168.935, which provides the penalty for felonies. Thus, the existence of MCL 168.932(c) does not change the Court of Appeals' conclusion, *Pinkney*, 316 Mich App at 464-465, that MCL 168.937 would be surplusage if it were only a penalty provision.

This is in direct contrast to MCL 168.933, which expressly states that a person who violates it is "guilty of perjury" – thus pointing the reader to MCL 168.936, which provides the penalty for perjury, instead of MCL 168.935, which provides the penalty for felonies in general. Defendant asks this Court to construe MCL 168.932(c) as though it were written in a parallel manner to MCL 168.933. But "[c]ourts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *People v Gloster*, 499 Mich 199, 206; 880 NW2d 776 (2016) (quotation omitted).

And defendant's theory that by enacting MCL 168.932(c), the Legislature intended to "limit[] forgery prosecutions to persons who have heightened responsibilities in relation to elections or election documents" (Application for Leave at 45), is unconvincing. Defendant submits that the Legislature might have exempted most citizens from forgery prosecutions to avoid "chilling" their electoral rights. This is rather like saying that laws against forging checks

chill the right to engage in commerce. It is untenable to argue that the Legislature, whose stated purpose was to provide for the purity of elections, intended to allow most people to forge election documents with impunity. But that would be the result if defendant's proposed limitation on MCL 168.937 were accepted.

Defendant contends that MCL 168.932(c), or part of it, would be rendered surplusage if MCL 168.937 is a substantive prohibition of forgery under the Election Law. But "[t]he Legislature frequently and reasonably criminalizes similar instances of misconduct in separate and independent statutes that share common elements." *Hall II*, 499 Mich at 459, citing *People v Ford*, 417 Mich 66, 94-95; 331 NW2d 878 (1982). Although MCL 168.932(c) describes some activity that could also constitute forgery under MCL 168.937, such as falsifying or making fraudulent entries or alterations on certain documents, the section as a whole describes many other activities that are decidedly *not* forgery, such as bribery, breaking into ballot boxes, disclosing someone's vote, and obstructing electors. Even subsection (c) describes other acts that are not forgery: willfully destroying, mutilating, or removing documents. Conversely, MCL 168.937, like MCL 168.932(c), proscribes falsification of election documents by election officials, but also prohibits forgery of election documents by anyone else. The fact that the crimes defined by each statute intersect does not render either statute superfluous.

It is unsurprising, then, that this Court stated that offenses in the chapter of the Election Law containing MCL 168.937 *supplement* the prohibitions defined elsewhere, and gave MCL 168.932 as an example of a prohibition that was defined elsewhere. *Hall II*, 499 Mich at 453 and n 11. This Court was well aware of MCL 168.932, but still concluded that forgery, proscribed by MCL 168.937, is not defined elsewhere in Michigan's Election Law. *Id.* at 456.

Defendant also cites one sentence from MCL 168.759(8) as a definition of forgery that renders MCL 168.937 a mere penalty provision:

> A person who makes a false statement in an absent voter ballot application is guilty of a misdemeanor. *A person who forges a signature on an absent voter ballot application is guilty of a felony.* A person who is not authorized in this act and who both distributes absent voter ballot applications to absent voters and returns those absent voter ballot applications to a clerk or assistant of the clerk is guilty of a misdemeanor. [Emphasis added.]

This claim is no more persuasive than defendant's claim about MCL 168.932(c). Again, MCL 168.759(8) says that a person who forges a signature on an absent voter application is guilty of a *felony*. Again, the penalty for felonies (unless otherwise provided) is found in MCL 168.935. So MCL 168.937 would still be surplusage if it were only a penalty provision. The Legislature could easily have written the second sentence of MCL 759(8) to say that a person who forges a signature on an absent voter application "is guilty of forgery," or "shall be punished as provided in § 937." Instead, the Legislature made no reference to MCL 168.937 at all. This Court should decline defendant's invitation to read into MCL 168.759(8) "what is not within the Legislature's intent as derived from the language of the statute." *AFSCME v Detroit*, 468 Mich 388, 400; 662 NW2d 695 (2003).

Also, as defendant notes, MCL 168.759(8) was not enacted until 1995. If this is the sole definition of forgery to which the penalty of MCL 168.937 applies, then MCL 168.937 was pointless for the first 40 years of its existence.

As with MCL 168.932(c), defendant asserts that the second sentence of MCL 168.759(8) would be surplusage if MCL 168.937 prohibits forgery of election documents. But this claim is even less convincing with regard to MCL 168.759(8). The first sentence of that subsection declares that a person who makes a false statement in an absent voter ballot application is guilty of a misdemeanor. Without clarification, a reader might assume that forging a signature on an

absent voter ballot application was simply one form of false statement – a false representation that the signer was the person whose name appears. The second sentence prevents that confusion by specifying that the Legislature intended to make forging a signature a felony, removing the possibility that someone who does so could be prosecuted for a misdemeanor.

Nor does defendant's interpretation further the purpose of the Election Law. Defendant claims that although forgery prosecutions were limited to election officials for the first 40 years after 1954 PA 116 was enacted, the Legislature "expanded" them under MCL 168.759(8) to include all people – but only with regard to absentee ballots. Most people, according to defendant, can still falsify other election documents without penalty. This construction does little to preserve the purity of elections or to guard against the abuse of the elective franchise.

**B. Defendant has failed to show that MCL 168.937 is void for vagueness or that the "rule of lenity" applies in his case.**

Statutes are presumed to be constitutional, and this Court will construe a statute as constitutional unless its unconstitutionality is clearly apparent. *People v Harris*, 495 Mich 120, 134; 845 NW2d 477 (2014). Defendant argues that MCL 168.937 is unconstitutionally vague because it does not provide fair notice of the conduct proscribed. See *Woll v Kelley*, 409 Mich 500, 533; 297 NW2d 578 (1980). This Court has already rejected this argument in *Hall II*.

"'[A] statute is not vague when the meaning of the words in controversy can be fairly ascertained by reference to judicial determinations, *the common law*, dictionaries, treatises or even the words themselves, if they possess a common and generally accepted meaning.'" *Harris*, 495 Mich at 138 n 49, quoting *People v Cavaiani*, 172 Mich App 706, 714; 432 NW2d 409 (1988) (emphasis added). See also *Rose v Locke*, 423 US 48, 50; 96 S Ct 243; 46 L Ed 2d 185 (1975) (rejecting a vagueness challenge to a statute prohibiting "crimes against nature" and

observing that "the phrase 'crimes against nature' is no more vague than many other terms used to describe criminal offenses at common law").

The meaning of "forgery" in MCL 168.937 is defined by reference to the common law. *Hall II*, 499 Mich at 456. It is "'a false making, or a making *malo animo* of any written instrument with intent to defraud.'" *Id.*, quoting *People v Warner*, 104 Mich 337, 340; 62 NW 405 (1895). This Court also referenced *People v Susalla*, 392 Mich 387, 390; 220 NW2d 405 (1974) ("'[F]orgery includes any act which fraudulently makes an instrument purport to be what it is not.'") *Hall II*, 499 Mich at 456 n 31.

This Court has held that MCL 168.937 gives sufficient notice of the conduct it prohibits to satisfy due process. *Hall II*, 499 Mich at 460-463.

> Defendant's prosecution under MCL 168.937 did not violate fundamental elements of fairness given the Court of Appeals' holding that MCL 168.937 is a substantive offense and given that the plain text of that statute informed him he could be subject to felony charges if he committed election law forgery.... [*Id.* at 463 (footnotes and quotation marks omitted).]

The plain text of MCL 168.937 informed defendant in this case, as it did the defendant in *Hall II*, that he could be subject to felony charges if he committed election law forgery.

Nor does the "rule of lenity" apply here. "The rule of lenity properly applies only in the circumstances of an ambiguity, or in the absence of any firm indication of legislative intent." *People v Wakeford*, 418 Mich 95, 113-114; 341 NW2d 68 (1983). Again, MCL 168.937 is not ambiguous; it can be understood by reference to the common law. Nor is there an absence of a firm indication of legislative intent. The Legislature intended "to provide for the purity of elections" and "to guard against the abuse of the elective franchise." Prelude to 1954 PA 116 (Appendix C). That includes prohibiting the falsifying of election-related documents of all types by all people.

## REQUEST FOR RELIEF

For these reasons, defendant's application for leave to appeal should be denied.

DATED: June 28, 2017

Respectfully submitted,

/s/ Aaron J. Mead

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